

Federal Communications Commission

DATE: 02-2002

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Before the
Federal Communications Commission
Washington, D.C. 20554

SEP - 6 2002

FCC - MAILROOM

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 01-104
Table of Allotments,)	RM-10103
FM Broadcast Stations.)	RM-10323
(Auburn, Northport, Tuscaloosa, Camp Hill,)	RM-10324
Gardendale, Homewood, Birmingham, Dadeville,)	
Orrville, Goodwater, Pine Level, Jemison, and)	
Thomaston, Alabama) ¹)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 21, 2002

Released: August 30, 2002

By the Assistant Chief, Audio Division:

1. At the request of Auburn Network, Inc. ("petitioner"), the Audio Division has before it a Notice of Proposed Rule Making, 16 FCC Rcd 8937 (2001), proposing the allotment of Channel 263A at Auburn, Alabama, as the community's second local FM transmission service (RM-10103).² Tiger Communications, Inc., filed comments suggesting a change in petitioner's proposed antenna site to accommodate Station WQNR(FM)'s plans to move its transmitter site at Tallassee, Alabama. WNNX LICO, Inc., licensee of Station WWWQ(FM), College Park, Georgia, filed comments advising that petitioner's proposal was in conflict with the Station WWWQ(FM)'s pending one-step upgrade application at College Park, Georgia. In response to the Notice, three counterproposals were filed. First, a counterproposal was filed by Radio South, Inc. ("RSI"), licensee of Stations WLXY(FM), Northport, Alabama, and WTUG(FM), Tuscaloosa, Alabama, proposing the reallocation of Channel 263C1 from Northport to Helena, Alabama, and the modification of Station WLXY(FM)'s license accordingly (RM-10323). To accommodate the reallocation to Helena, RSI also requested the reallocation of Channel 225C1 from Tuscaloosa to Northport, Alabama, and a change in the community of license for Station WTUG(FM) to Northport as a replacement service.

¹ The communities of Northport, Tuscaloosa, Camp Hill, Gardendale, Homewood, Birmingham, Dadeville, Orrville, Goodwater, Pine Level, Jemison, and Thomaston, Alabama were added to the captioned.

² Petitioner subsequently filed a motion to withdraw its expression of interest for the Auburn allotment. In compliance with Section 1.420(j) of the Commission's Rules, petitioner stated that an oral agreement was entered into with Cox Radio, Inc., paying petitioner \$25,000 for expenses incurred in return for the dismissal of the Auburn petition. Petitioner also filed a supplement with an itemization of its legitimate and prudent expenses which indicates that the \$25,000 payment does not exceed its expenses. Additionally, a declaration was filed by Richard A. Ferguson on behalf of Cox Radio, Inc., stating that no person or entity has paid or promised any consideration to Cox in connection with Auburn's withdrawal and that the only payment to Auburn Network is the \$25,000 that is the subject of the oral agreement described above.

2. Second, a counterproposal was filed by Cox Radio, Inc., and its wholly-owned subsidiary CXR Holdings, Inc. (collectively "Cox"), proposing the substitution of Channel 247C2 for Channel 247A at Homewood, Alabama, the reallocation of Channel 247C2 from Homewood to Gardendale, Alabama, and the modification of Cox's license for Station WRLR(FM) accordingly (RM-10324). To accommodate the reallocation to Gardendale, Cox also proposed (a) the substitution of Channel 262A for Channel 247A at Dadeville, Alabama, and the modification of Station WZLM(FM)'s license accordingly; (b) the substitution of Channel 300A for Channel 247A at Orrville, Alabama, and the modification of Station WJAM-FM's license accordingly; (c) the reallocation of Channel 248A from Talladega to Goodwater, Alabama, and the modification of Station WSSY-FM's license accordingly; (d) the reallocation of Channel 295C from Birmingham to Homewood, Alabama, and the modification of Station WODL(FM)'s license accordingly; (e) the modification of the reference coordinates for vacant Channel 248A, Pine Level, Alabama; (f) the reallocation of Channel 249A from Clanton to Jemison, Alabama, and the modification of Station WEZZ-FM's license accordingly; and (g) the modification of the reference coordinates for Station WAYI(FM), Channel 249A, Thomaston, Alabama. Third, a counterproposal was filed by International Systems Corp. proposing the allotment of Channel 262A at Camp Hill, Alabama, as the community's first local aural transmission service.³ Cox filed reply comments and further reply comments.

Discussion

3. After fully considering the record in this proceeding, we are dismissing the RSI and Cox counterproposals. Although the counterproposals filed by RSI and Cox were placed on Public Notice,⁴ a reexamination of those counterproposals reveals that they were technically defective when filed and, as a result, cannot be granted. Specifically, the RSI proposal requesting the reallocation of Channel 263C1 from Northport to Helena, Alabama, was short-spaced to the licensed site for Station WWWQ(FM), Channel 263C, Anniston, Alabama.⁵ Likewise, in the Cox counterproposal, the substitution of Channel 262A for Channel 247A at Dadeville, Alabama, which is required to accommodate the upgrade and reallocation of Station WRLR(FM) from Homewood to Gardendale, Alabama, was short-spaced to the licensed site for Station WWWQ(FM), Channel 263C, Anniston, Alabama.⁶ As such, RSI's proposed reallocation at Helena and Cox's proposed channel substitution at Dadeville violated Section 73.208(a)(1)(i) of the Rules. This rule section requires that rulemaking petitions or counterproposals seeking to amend the FM Table of Allotments must clear existing station authorizations such as the licensed site for Station WWWQ(FM), Channel 263C, Anniston, Alabama.

³ The Camp Hill, Alabama, counterproposal was technically defective and was not placed on Public Notice. Specifically, at the reference coordinates proposed (32-51-59 NL and 85-47-29), the proposal would not provide city-grade coverage to the community, and therefore, violates Section 73.315(a) of the Commission's Rules.

⁴ See Report No. 2506, October 23, 2001.

⁵ The actual spacing between Channel 263C1 at Helena and Channel 263C at Anniston is 139 kilometers whereas the required spacing is 270 kilometers.

⁶ The actual spacing between Channel 262A at Dadeville and Channel 263C at Anniston is 82.8 kilometers while the Commission's Rules require a spacing of 165 kilometers.

4. While Station WWWQ(FM) was granted a reallocation and downgrade to move to College Park, Alabama, on Channel 263C3,⁷ a petition for reconsideration of that action was filed. As a result, the reallocation at College Park was not final at the time that RSI and Cox filed their counterproposals in the instant proceeding, MM Docket No. 01-104, and both counterproposals were, therefore, required to clear the licensed site for Station WWWQ(FM), Channel 263C, Anniston, because counterproposals must be "technically correct and substantially complete" at the time they are filed.⁸ Although both RSI's proposed reallocation at Helena and Cox's proposed channel substitution at Dadeville clear Station WWWQ(FM)'s reference coordinates for the reallocation and downgrade at College Park, it is our policy not to accept rulemaking proposals that are contingent on the licensing of facilities set forth in an outstanding construction permit⁹ or are dependent upon final action in another rulemaking proceeding.¹⁰ The rationale for this policy is that processing contingent proposals is not conducive to the efficient transaction of Commission business and imposes unnecessary burdens on the staff.¹¹ The staff would either have to wait until the contingency is met, thereby further delaying action in a case, or would have to revisit a decision if a proposal was granted contingent on the outcome of an action that never occurred. In either case, the staff's attempts at processing cases and achieving finality is frustrated.

5. Not only were RSI and Cox's counterproposals contingent and, therefore, technically defective when filed but also are contingent on the outcome of the Anniston and College Park proceeding, MM Docket 98-112, at the present time. Although the Commission recently denied a petition for reconsideration in MM Docket No. 98-112 that had been referred by the staff to the Commission,¹² a further petition for reconsideration and second motion to open the record was filed on August 19, 2002. As a result, RSI and Cox's counterproposals are not capable of being effectuated at this time and thus violate our above discussed policy on granting contingent proposals.

⁷ See *Anniston and Ashland, Alabama, et al.*, 15 FCC Rcd 9971 (2000), 16 FCC Rcd 3411 (2001), and 16 FCC Rcd 19857 (2001).

⁸ See *Broken Arrow and Bixby, Oklahoma, et al.*, 3 FCC Rcd 6507 (1988), *recon. denied*, 4 FCC Rcd 6981 (1989); *Fort Bragg, California*, 6 FCC Rcd 6817 (1991); *Provincetown et al., Massachusetts*, 8 FCC Rcd 19 (1992); and *Sanford and Robbins, North Carolina*, 12 FCC Rcd 1 (1997).

⁹ See *Cut and Shoot, Texas*, 1 FCC Rcd 16383 (Policy and Rules Div. 1996) (dismissal of a rulemaking petition that was fully spaced to an outstanding construction permit of another station but was short-spaced to the licensed site of the station affirmed because the proposal violated Section 73.208(a) and was contingent on the building and licensing of the facilities set forth in the construction permit).

¹⁰ See, e.g., *Esperanza, Puerto Rico, Christiansted, Virgin Islands*, 11 FCC Rcd 2908 (Policy and Rules Div. 1996) (dismissal of a rulemaking petition affirmed because the request was contingent on the outcome of another proceeding that was not final due to the pendency of a petition for reconsideration); *Oxford and New Albany, Mississippi*, 3 FCC Rcd 615, 617 n.3 (1988), *recon.*, 3 FCC Rcd 6626 (1988); and *Frederiksted, Virgin Islands and Culebra and Carolina, Puerto Rico*, 10 FCC Rcd 13627 (Allocations Br. 1995).

¹¹ See *Cut and Shoot, Texas*, 11 FCC Rcd at 16384.

¹² See *Anniston and Ashland, Alabama, et al. (MO&O)*, MM Docket No. 98-112, FCC 02-201, released July 25, 2002.

6. In view of the above, IT IS ORDERED, That, as requested, the Petition for Rule Making filed by Auburn Network, Inc., IS DISMISSED.

7. IT IS FURTHER ORDERED, That the Counterproposal filed by Radio South, Inc., IS DISMISSED.

8. IT IS FURTHER ORDERED, That the Counterproposal filed by Cox Radio, Inc. and its wholly-owned subsidiary CXR Holdings, Inc., IS DISMISSED.

9. IT IS FURTHER ORDERED, That the Counterproposal filed by International Systems Corp., IS DISMISSED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Sharon P. McDonald, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau